

## **REMARKS**

### **1) Summary of the Prosecution to Date**

Claims 1, 2, 4 and 19 to 44 are currently pending in the subject application. Claims 3 and 5 - 18 have been cancelled.

In the second Office Action (made final) of April 10, 2002, claims 1, 2, 4 and 19 to 44 were rejected under the judicially created doctrine of obviousness-type double patenting over claims 1-29 of U.S. Patent No. 6,243,677. In addition, claims 1, 2, 4, 19 to 22 and 28 were rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent 4,877,128 to Strickland.

By a response to Final Office Action of June 10, 2002, the applicant responded to these outstanding rejections. By an advisory action mailed June 21, 2002 the Examiner acknowledged the filing of a terminal disclaimer. Nonetheless, notwithstanding the applicant's argument, the Examiner maintained the rejections based on US Patent 4,877,128 of Strickland. The Examiner indicated that, in light of the filing of the terminal disclaimer, claims 23 - 27 and 29 - 44 were objected to, but would have been allowable if re-written in independent form.

The applicant then appealed the rejections of claims 1, 2, 4 and 19 - 44, and, to that end, filed an Applicant's Brief on Appeal on December 10, 2002. The Examiner's Response was mailed on January 27, 2003. The applicant filed an RCE on March 27, 2003.

A new, non-final office action was mailed in this matter on May 23, 2003. In that office action, claims 1, 2, 19 - 24, 28, and 29 were rejected under 35 USC 102 as being anticipated by US Patent 5,465,885 of Wyatt. No further rejections were made. The former rejections made on the basis of Strickland were withdrawn. The remaining claims 4, 25 - 27, 30 - 33 and 35 - 44 were identified as being allowable if re-written in independent form.

2) Wyatt does not anticipate claims 1, 2, 4, 19-24, 28, 29 and 34

A. Statement of the Law Regarding Anticipation under 35 U.S.C. 102(b)

Anticipation can only be established by a single prior art reference: "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987); *Structural Rubber Products Co., v. Park Rubber Co.*, 749 F.2d 7070; 223 U.S.P.Q. 1264 (C.A.F.C. 1984). "The identical invention must be shown in as complete detail as is contained in the ... claim." *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989). The test for anticipation requires that all of the claimed elements must be found in exactly the same situation and united in the same way to perform the same function in a single unit of the prior art. *Studiengesellschaft Kohle, m.b.H. v. Dart Industries, Inc.*, 762 F.2d 724, 726, 220 U.S.P.Q. 841 at 842 (C.A.F.C. 1984). Anticipation cannot be predicated on teachings in a reference that are vague or based on conjecture. *Datascope Corp. v. SMEC Inc.*, 594 F. Supp. 1036; 224 U.S.P.Q. 694, 698 (D.N.J. 1984).

As a preliminary matter, the applicant notes that the Examiner no longer relies on the formerly cited Strickland reference, and has accepted the applicant's arguments with respect to that reference without further comment.

B. Wyatt

In the rejections, US Patent 5,465,885 of Wyatt is said to disclose an insulated container that is "inherently" collapsible, and that the first portion is "inherently" securable in the collapsed position. Furthermore, the "fluid container" of Wyatt is said to meet "the claimed structure of applicant's liner.

The applicant respectfully traverses each and every one of these allegations. There is nothing in Wyatt that indicates that Wyatt's backpack is intended to be collapsible, and there is no indication that it is intended to be secured, or has had provision made for such securement, in a collapsed position.

The rejection undermines itself when the allegation is made that the “fluid container” is a liner. First, as previously noted in the context of the Strickland reference formerly cited, while the Examiner is entitled to take a broad view of a reference (and, indeed, it is his public duty), that view cannot be so broad as to make a nonsense of it.

Wyatt, like Strickland, shows a bottle. That is the plain and ordinary understanding that a person skilled in the art would have of Wyatt’s item 20. The applicant submits that the characterisation of Wyatt’s bottle as a “liner” of the container is, as it was with Strickland, contrived and artificial, and is not an interpretation that is reasonably or fairly borne by the feature shown in the reference. The applicant respectfully submits that, as was done previously with the Strickland reference, the Examiner has erred in relying on an interpretation of the cited Wyatt reference that is convoluted and artificial, contrary to the principles of claim construction given in *Dayco Products*, previously cited.

Second, there is no indication that Wyatt’s bottle is, or is intended to be, collapsible. That being the case, and given that the rejection provides no explanation of how Wyatt’s bottle is consistent with the assertion that the container is “inherently” collapsible, it is difficult to see how the rejection can stand. Plainly, it is not consistent. The assertion that the bottle is to be interpreted as being the “liner” implicitly contradicts the previous assertions that the container is “inherently” collapsible and “inherently” securable in a collapsed position. As such, the applicant respectfully submits that the Office Action provides its own rebuttal of the rejection of claims 1 and 28, and of any rejection of any claim dependent from either claim 1 or claim 28.

The applicant respectfully submits that no proper rejection under 35 USC 102 has been established against any of claims 1, 2, 4, 19 – 24, 28, 29 or 34. In that light the applicant requests that the case be passed to allowance.

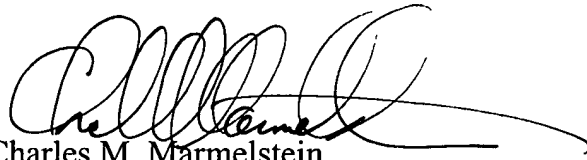
In the event that the Examiner proposes to sustain any of the presently made rejections, that applicant respectfully requests (a) that the arguments made above be explicitly addressed, (b) that an explanation be provided to address the internal inconsistency of the rejections noted above; and (c) that the applicant be provided with a

full and fair non-final opportunity to respond to any such clarification or explanation that may be provided.

In the event that any fees are due with respect to this paper, please charge Deposit Account No. 01-2300, referencing Atty. Docket No. 100570-00018.

Respectfully submitted,

ARENT FOX KINTNER PLOTKIN & KAHN, PLLC



Charles M. Marmelstein  
Registration No. 25,895

Atty. Docket No.: 100570-00018

Customer No. 004372  
1050 Connecticut Avenue, N.W.  
Suite 400  
Washington, D.C. 20036-5339  
Tel (202) 857-6000  
Fax (202) 638-4810

CMM:mmg